Majlis Perbandaran Seremban v Maraputra Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R2–25–75 OF 2001
FAIZA TAMBY CHIK J
14 APRIL 2003

Arbitration — Award — Setting aside — Application — Whether errors of law on the face of award — Whether erroneous interpretation of the Conditions of Contract — Whether misconduct existed on the part of the arbitrator — Whether sufficient ground to set aside award — Whether court may interfere with award of arbitrator

The applicant is the local authority responsible for the municipal of Seremban, Negeri Sembilan. Some time in 1989, the applicant appointed the respondent as the main contractor to carry out three of the packages of Stage 1 of the Seremban Sewerage Project under three separate contracts (hereinafter 'Contract 101', 'Contract 106' and 'Contract 110' respectively and 'the Contracts' collectively). The Contracts were all on the PWD Form 203A standard form of contract. In respect of Packages 101 and 110 the contract works were completed, but there were contractual claims arising therefrom. These were disputed by the applicant. In respect of Package 106, the respondent suspended works on 22 January 1993 after having earlier given notice in December 1992 claiming that it was entitled to do so unless it was paid for various contractual claims. These claims are also disputed by the applicant. The disputes under the three Contracts (collectively referred to as 'the Disputes') were referred to arbitration, and the parties agreed to appoint an Arbitrator to determine the Disputes. In March 1995 an agreement in writing was entered into to mutually terminate the Contract in respect of Package 106 on terms preserving the parties' rights to revolve the remaining part of the Disputes ('the remaining Disputes') in the arbitration. The Arbitrator then convened a preliminary meeting to give directions. Pursuant to these directions, the respondent filed its points of claim, the applicant its defence and counterclaim and the respondent its reply and defence to counterclaim. The arbitral hearing commenced on 18 October 1999 after preliminary matters had been dealt with in prior preliminary meetings. The arbitral hearing was only on liability as agreed to by the parties. This hearing resulted in an Award on Liability dated 8 June 2001 ('the Award'), after evidence had been taken and submissions (written and elaborated on orally) made by the parties. The applicant sought to set aside the Award given by the learned Arbitrator. The applicant contended that the learned Arbitrator misconducted himself and/or the proceedings and/or exceeded his jurisdiction in dismissing the applicant's counterclaim and allowing the respondent's claims. The applicant contended that the Award contained errors of law on its face and/or lacked cogency. The applicant also contended that the learned Arbitrator erroneously interpreted cl 54 of the conditions of contract (ie the arbitration clause) by concluding that only the contractor may refer disputes to arbitration, and not the employer.

Held, dismissing the application:

(1) For purposes of considering whether there are error of law on the face of the award, the courts are entitled to perusal of the award and such

documents incorporated into the award eg contract, evidence etc as referred to by an arbitrator in his reasoning for his decision(s) in the award. As such, if the arbitrator's decision does not make any reference to any evidence, then the court is not entitled to look into any evidence in considering whether there has been an error of law on the face of the award and can only look at the wording of the award itself. On the other hand, if an award is clearly fully reasoned, with extensive references to the evidence and legal submissions made by the parties as part of the reasoning of the arbitrator for his decision(s), as in our case, the court is fully entitled to consider all the evidence and legal submissions considered by the arbitrator in his award to see if the decision(s) of the arbitrator is correct in law (see para 2).

(2) The construction of cl 54 was a matter that has been the subject of proper submissions before the learned Arbitrator. The parties had put in written skeletal submissions as well as made full oral submissions before the Arbitrator on the Three Issues. In any event, apart from the fact that the wording of cl 54 was clear and unambiguous, the Arbitrator's reasoning in his Decision on Three Issues was sound, cogent and clear. The applicant has not shown any misconduct on the part of the Arbitrator. The applicant merely disagreed with the Arbitrator's decision, and whilst this may be unfortunate, it was not something that was within this court's jurisdiction to remedy. Secondly, the applicant did not at any material time make any application to the courts to challenge the learned Arbitrator's decision on the Three Issues which was a question of the proper construction of cl 54 of the conditions of the contract. It follows therefore that if the applicant, having not challenged the Arbitrator's decision on cl 54 in relation to the Three Issues, the applicant necessarily accepts the Arbitrator's decision on cl 54 in all situations, which is also applicable to the counterclaim. It was therefore noted that the applicant's application herein to challenge the learned Arbitrator's decision on the construction of cl 54 with regard to the counterclaim, was filed out of time and should be dismissed in limine (see para 5).

(3) On the issue of misconduct of the Arbitrator in failing to take into account 'the material and relevant evidence or submission of the counterclaim to him', this was clearly untenable. The point of the employer's right to refer disputes to arbitration had already been put to the parties. Whether it was in relation to the applicant's counterclaim or the respondent's claim does not detract from the fact that the point has already been brought to the parties' attention. The Arbitrator had also found other reasons as to why the applicant's counterclaim should be disallowed, irrespective of his findings on the applicant' right to refer. The applicant has not shown that the Arbitrator had failed to take into account any material and relevant evidence or submission. In fact, the Arbitrator was not required to mention all and every piece of evidence and questions of law and fact in his award. He only needed to refer to material and relevant evidence to suit the key question to the dispute (see para 8).

(4) It would appear that the applicant was attempting to change this court's supervisory function into that of an appellate one. The conclusions reached by the learned Arbitrator were mixed conclusions of fact and

law which could not be properly reviewed in an application such as this. There were no fundamental errors of law in the Award. The Award was cogent and certain. All the decisions made by the Arbitrator in the Award were properly reasoned (see para 30).

[**Bahasa Malaysia summary**

Pemohon adalah pihak berkuasa tempatan yang bertanggungjawab untuk munisipal Seremban, Negeri Sembilan. Pada tahun 1989, pemohon melantik responden sebagai kontraktor utama untuk menjalankan tiga daripada pakej Tahap 1 Projek Pembentungan Seremban di bawah tiga kontrak berasingan ('Kontrak 101', 'Kontrak 106', dan 'Kontrak 110' masing-masing dan 'Kontrak-kontrak tersebut' secara kolektif). Kontrak-kontrak tersebut kesemuanya berada dalam format PWD Borang 203A yang merupakan format standard kontrak. Kerja-kerja kontrak bagi Pakej-pakej 101 dan 110 telah disiapkan tetapi wujud tuntutan kontraktual yang timbul daripadanya. Ini dipertikaikan oleh pemohon. Berkenaan dengan Pakej 106, responden telah menggantung kerja-kerja pada 22 Januari 1993 setelah memberi notis pada Disember 1992 mendakwa bahawa ia berhak berbuat demikian kecuali ia dibayar pelbagai tuntutan kontraktual. Tuntutan-tuntutan ini turut dipertikaikan oleh pemohon. Pertikaian-pertikaian di bawah tiga Kontrak-Kontrak tersebut ('Pertikaian-Pertikaian' secara kolektif) telah dirujuk kepada timbangtara, dan pihak-pihak telah bersetuju melantik Penimbangtara untuk memutuskan Pertikaian-Pertikaian. Pada Mac 1995, satu perjanjian bertulis bersama telah dibuat untuk menamatkan Kontrak berkenaan dengan Pakej 106 atas terma-terma bahawa hak-hak parti-parti untuk menyelesaikan bahagian-bahagian Pertikaian-Pertikaian selebihnya dilindungi ('Pertikaian-Pertikaian Selebihnya') dalam timbangtara tersebut. Penimbangtara kemudiannya menjalankan mesyuarat permulaan untuk memberikan arahan-arahan. Berikutan arahan-arahan ini, responden telah memfailkan butiran tuntutannya, pemohon pembelaannya dan tuntutan balas dan responden balasannya serta pembelaan kepada tuntutan balas. Pendengaran timbangtara bermula pada 18 Oktober 1999 setelah perkara-perkara permulaan diselesaikan dalam mesyuarat–mesyuarat permulaan. Pendengaran timbangtara hanya terhad kepada liabiliti seperti yang telah dipersetujui oleh pihak-pihak. Hasil daripada pendengaran ini adalah Award Liabiliti bertarikh 8 Jun 2001 ('Award'), yang diberi setelah keterangan dikemukakan dan hujah-hujah (bertulis dan dijelaskan secara lisan) dibuat oleh pihak-pihak. Pemohon kini ingin mengenepikan Award yang dibuat oleh Penimbangtara terpelajar. Pemohon menegaskan bahawa Penimbangtara terpelajar telah melakukan salah laku diri dan/atau prosiding dan/atau melebihi bidang kuasanya dalam mengenepikan tuntutan balas pemohon dan membenarkan tuntutan-tuntutan responden. Pemohon menegaskan bahawa award tersebut mengandungi kekhilafan undang-undang pada zahirnya dan/atau kurang meyakinkan. Pemohon turut menegaskan bahawa Penimbangtara terpelajar telah khilaf dalam menafsirkan kl 54 syarat-syarat kontrak (iaitu klausa timbangtara) dengan memutuskan bahawa hanya kontraktor boleh merujuk pertikaian kepada timbangtara, dan bukannya majikan.

Diputuskan, menolak permohonan: A

(1) Bagi tujuan membuat pertimbangan sama ada wujuf kekhilafan undang-undang pada zahir award tersebut, mahkamah-mahkamah berhak meneliti award dan dokumen-dokumen yang dimasukkan ke dalam award contohnya kontrak, keterangan dan lain-lain seperti yang telah dirujuk oleh Penimbangtara dalam alasan-alasan keputusan dalam award. Oleh itu, sekiranya keputusan Penimbangtara tidak merujuk sebarang keterangan, mahkamah tidak berhak meneliti sebarang keterangan dalam menentukan sama ada wujud kekhilafan undang-undang pada zahir award dan hanya boleh meneliti susunan kata award itu sendiri. Sebaliknya, sekiranya sesuatu award itu menyatakan alasan-alasan sepenuhnya, dengan rujukan ekstensif dibuat kepada keterangan dan hujah-hujah undang-undang yang dibuat oleh pihak-pihak sebagai sebahagian daripada alasan Penimbangtara bagi keputusannya-keputusannya, seperti dalam kes ini, mahkamah berhak untuk mengambilkira kesemua keterangan dan hujah-hujah undang-undang yang dipertimbangkan oleh Penimbangtara dalam memberi award untuk melihat sama ada keputusan-keputusan Penimbangtara tersebut adalah betul dari segi undang-undang (lihat perenggan 2). B C D

(2) Penafsiran kl 54 merupakan perkara yang menjadi subjek kepada hujah-hujah teliti di hadapan Penimbangtara terpelajar. Pihak-pihak telah mengemukakan rangka hujahan bertulis serta turut membuat hujahan lisan sepenuhnya di hadapan Penimbangtara berkenaan Ketiga-Tiga Isu. Walau bagaimanapun, selain daripada fakta bahawa susunan kata kl 54 adalah jelas dan tidak samar, alasan-alasan penimbangtara dalam keputusannya atas Ketiga-Tiga Isu adalah kukuh, meyakinkan dan jelas. Pemohon tidak menunjukkan sebarang salah laku atas pihak penimbangtara. Pemohon cuma tidak bersetuju dengan keputusan penimbangtara, dan walaupun ini kurang baik, ia bukanlah dalam bidang kuasa mahkamah ini untuk meremedikannya. Kedua, pemohon tidak pada apa-apa masa yang material membuat permohonan kepada mahkamah untuk mencabar keputusan penimbangtara atas Ketiga-Tiga Isu yang merupakan persoalan mengenai penafsiran yang sepatutnya bagi kl 54 Terma-Terma kontrak. Berikutan ini, jika Pemohon tidak mencabar keputusan penimbangtara mengenai kl 54 berkenaan dengan Ketiga-Tiga Isu, pemohon juga perlu menerima keputusan Penimbangtara mengenai kl 54 dalam semua keadaan, yang turut terpakai kepada tuntutan balas. Oleh itu diambilkira bahawa permohonan Pemohon disini untuk mencabar keputusan Penimbangtara yang terpelajar mengenai penafsiran kl 54 berkenaan tuntutan balas, telah difailkan di luar masa yang diperuntukkan dan harus diketepikan *in limine* (lihat perenggan 5). E F G H

(3) Mengenai isu salah laku Penimbangtara dalam gagal mengambilkira 'the material and relevant evidence or submission of the counterclaim to him', ianya tidak dapat dipertahankan. Butiran mengenai hak majikan untuk merujuk pertikaian kepada timbangtara telah pun di bawa kepada pengetahuan pihak-pihak. Sama ada ia berkaitan dengan tuntutan balas Pemohon atau pun tuntutan responden, tidak menyimpang daripada fakta bahawa butiran tersebut telah pun dibawa kepada perhatian pihak-pihak. Penimbangtara turut memutuskan alasan-alasan lain untuk I

menolak tuntutan balas pemohon, tanpa mengambilkira keputusannya mengenai hak pemohon untuk membuat rujukan. Pemohon tidak menunjukkan bahawa Penimbangtara telah gagal mengambilkira keterangan atau hujah yang material dan relevan. Malah, Penimbangtara tidak perlu menyatakan kesemua dan setiap satu keterangan dan persoalan undang-undang dan fakta dalam awardnya. Beliau hanya perlu merujuk kepada keterangan yang material dan relevan untuk disesuaikan kepada persoalan penting dalam pertikaian (lihat perenggan 8).

(4) Adalah didapati bahawa pemohon cuba menukar fungsi penyeliaan mahkamah ini kepada rayuan. Kesimpulan-kesimpulan yang telah diperoleh oleh Penimbangtara yang terpelajar merupakan kesimpulan fakta dan undang-undang yang tidak dapat dikaji dengan betul dalam permohonan seperti ini. Tiada kekhilafan undang-undang yang penting dalam Award. Award tersebut adalah meyakinkan dan pasti. Kesemua keputusan yang dibuat oleh Penimbangtara dalam Award itu disokong alasan-alasan yang sesuai (lihat perenggan 30).]

Notes

For cases on setting aside arbitration awards, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1202–1245.

For challenging the award, see 13 *Halsbury's Laws of Malaysia*, paras [220.121]–[220.135].

Cases referred to

Attorney-General of Singapore, The v Wong Wai Cheng [1980] 1 MLJ 131 (refd)
Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331 (refd)
Cantebury Pipe Lines Ltd v Christchurch Drainage Board (1979) 16 BLR 76 (refd)
Department of Environment for Northern Ireland v Farrans (Construction) Ltd (1981) 19 BLR 1 (refd)
FG Minter Ltd v Welsh Health Technical Services Organization (1980) 13 BLR 1 (refd)
Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor [1999] 2 MLJ 481 (refd)
Interbulk Ltd v Aiden Shipping Co Ltd ('The Vimeira') [1984] 2 Lloyd's Rep 66 (refd)
Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd 1 BLR 111 (refd)
Pittalis & Others v Sherefettin [1986] QB 868 (refd)
Puri Construction Pvt Ltd v Union of India 1989 AIR SC 777 (refd)
Rees & Kirby Ltd v Swansea City Council (1985) 30 BLR 1 (refd)
Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority [1971] 2 MLJ 210 (refd)
Societe Franco Tunisienne D'Armement Tunis v Government of Ceylon [1959] 1 WLR 787 (refd)
Supamarl Ltd v Federated Homes Ltd (1987) 9 Con LR 25 (refd)
Usaha Damai Sdn. Bhd v Setiausaha Kerajaan Selangor [1997] 5 MLJ 601 (refd)
WJ Alan & Co Ltd v El Nasr Export and Import Co [1972] 2 QB 189 (refd)

Legislation referred to

Arbitration Act 1952 ss 22, 24
Rules of the High Court 1980 O 69 r 4(1)

Eileen Yeoh (Rajendran with her) (Azman, Davidson & Co) for the applicant.
Syahrul Bahiah (Vinayak Pradman with him) (Skrine) for the respondent.

Faiza Tamby Chik J:

[1] The applicant is the local authority responsible for the municipal of Seremban, Negeri Sembilan. Some time in 1989, the applicant appointed the respondent as the main contractor to carry out three of the packages of Stage 1 of the Seremban Sewerage Project, ie Packages 101, 106 and 110, under three separate contracts ('Contract 101', 'Contract 106' and 'Contract 110' respectively and 'the Contracts' collectively). The Contracts were all on the PWD Form 203A standard form of contract. (exh 'MPS-1'). In respect of Packages 101 and 110 the contract works were completed, but there were contractual claims arising therefrom. These were disputed by the applicant. In respect of Package 106, the respondent suspended works on 22 January 1993 after having earlier given notice in December 1992 claiming that it was entitled to do so unless it was paid for various contractual claims. These claims are also disputed by the applicant. The disputes under the three Contracts (collectively referred to as 'the Disputes') were referred to arbitration, and the parties agreed to appoint En Yusof Holmes Abdullah ('the Arbitrator') to determine the Disputes. Notwithstanding the reference to arbitration, the parties attempted to mediate the Disputes under auspices of the Ministry of Finance. These attempts largely failed, and in March 1995 an agreement in writing was entered into to mutually terminate the Contract in respect of Package 106 on terms preserving the parties' rights to revolve remaining part of the Disputes ('the remaining Disputes') in the arbitration (exh 'MPS-2'). The arbitrator then convened a preliminary meeting to give directions. Pursuant to these directions, the respondent filed its points of claim (exh 'MPS-3'), the applicant its defence and counterclaim (exh 'MPS-4') and the respondent its reply and defence to counterclaim (exh 'MPS-5'). The arbitral hearing commenced on 18 October 1999 after preliminary matters had been dealt with in prior preliminary meetings. The arbitral hearing was only on liability as agreed to by the parties. These hearings resulted in an award on liability dated 8 June 2001 ('the Award'), after evidence had been taken and submissions (written and elaborated on orally) made by the parties (exh 'MPS-6'). By this application, the applicant seeks to set aside the Award given by the learned Arbitrator, Mr Yusof Holmes dated 8 June 2001 ('the Award'). The applicant contends that the learned Arbitrator misconducted himself and/or the proceedings and/or exceeded his jurisdiction in dismissing the applicant's counterclaim and allowing the respondent's claims. The applicant contends that the Award contains errors of law on its face and/or lacked cogency.

[2] I think it would behove me to remind myself of the general principles governing such applications. This court derives its statutory jurisdiction from s 24 of the Arbitration Act 1952 ('the Act') which provides that this court may set aside the Award only if it finds that the Arbitrator has misconducted himself or the proceedings or if the arbitration or Award has been improperly procured. The latter limb is not immediately relevant here. In *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210,

at p 211 Raja Azlan Shah (as DYMM then was) sets out what constitutes arbitrator's misconduct although he qualifies it by saying that it is not an exhaustive list:

> In the law of arbitration, misconduct is sued in its technical sense as denoting irregularity and not moral turpitude. It includes failure to perform the essential duties which are cast on an arbitrator as such, for instance, failure to observe the rules of natural justice, appearance of bias or partiality. It also includes any irregularity of action which is not consonant with the general principles of equity and good conscience. These illustrations are not meant to be exhaustive. But failure to analyse and appraise the evidence does not vitiate the award on the ground of misconduct. It is only when the evidence is material, relevant and had gone to affect the award that the award will be vitiated ... . the plaintiff's complaint is sustainable only if the failure to do so had occasioned some irregularity causing a miscarriage of justice that is apparent on the face of the award.

[3] What is important to note is that this application is not to function as an appeal. It would be useful to reproduce the passage by Sharma J in *Puri Construction Pvt Ltd v Union of India* 1989 AIR SC 777, at p 780 which was quoted by Gopal Sri Ram JCA in *Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor* [1999] 2 MLJ 481, at p 488:

> 'When a court is called upon to decide the objections raised by a party against an arbitration award, the jurisdiction of the court is limited, as expressly indicated in the Arbitration Act and it has no jurisdiction to sit in appeal and examine the correctness of the award on merits.'

[4] Gopal Sri Ram JCA also stated as follows in *Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor* at p 488:

> … the jurisdiction to set aside or to remit an arbitration award whether at common law or under statute is one that should be exercised with great care and with a proper sense of responsibility.

[5] Neither should the applicant re-submit on the same issues again to whether this court will come to a different conclusion. As per Lord Dunedin in *Champsey Bhara Co v The Jivraj Balloo Spining & Weaving Co Ltd* 1923 AIR PC 66, at p 69 stated:

> An error in law on the face of the award ... does not mean that if in a narrative a reference is made to a contention of one party that opens the door to seeing first what the contention is, and then going to the contract on which the parties' rights depend to see if that contention is sound.

[6] In *Champsey Bhara*, one party applied to set aside an arbitration award, inter alia, for error of law on the face of the award and the legal issue before the Privy Council was whether the error of law appeared on the face of the award. The Privy Council found on the facts after studying the words of the award, that 'no legal proposition was stated as a ground of the award' (pp 68 and 69). In other words, it was a 'non-speaking award' insofar as there was no reason given for the decision arrived at in the award. Accordingly, the court held that a reference in the narrative or recital in the award to two letters, the letters not being part of the arbitrator's reasoning, does not entitle the court to look into the contentions in these letters or the contract (p 69). It is obvious from the above report that the Privy Council accepted that if

the award was worded differently ie in the reasoning for the decision, the arbitrator expressly referred to the letters, eg 'In respect of the grounds of rejection contained in the letters of the 11 and 25 November, and in respect of cl 52 of the Articles, I decide, etc.' (p 69, para 5) the court would then have been entitled to look into the letters and the contract to see if there was any error of law. In summary, therefore, it is clear that for purposes of considering whether there is an error of law on the face of the award, the courts are entitled to a perusal of the award and such documents incorporated into the award eg contract, evidence etc as referred to by an arbitrator in his reasoning for his decision(s) in the award. As such, if the arbitrator's decision does not make any reference to any evidence, then the court is not entitled to look into any evidence in considering whether there has been an error of law on the face of the award and can only look at the wording of the award itself. On the other hand, if an award is clearly fully reasoned, with extensive references to the evidence and legal submissions made by the parties as part of the reasoning of the arbitrator for his decision(s), as in our case, the court is fully entitled to consider all the evidence and legal submissions considered by the arbitrator in his award to see if the decision(s) of the arbitrator is correct in law. On our facts, it is submitted by the applicant that the Award is a fully reasoned award and contains lengthy reference to evidence and legal submissions in the Arbitrator's reasoning for his decisions on various points. This court is therefore fully entitled to consider all the matters (evidence, legal submissions and contract provisions) referred to by the Arbitrator in his reasoning expressed on the face of the Award to see if there has been any erroneous legal reasoning by the Arbitrator.

[7] What is apparent from the applicant's submissions is that the applicant is attempting to tailor its submissions so as to fit them into one of the grounds that would constitute misconduct. What the applicant is in fact inviting this court to do is to embark on a painstaking exercise of going through the evidence that was before the Arbitrator during the arbitral hearing and to examine the correctness of the Award on its merits. What this in effect amounts to is an appeal against the decision of the Arbitrator, which is not within this court's jurisdiction. Further, I think unless the applicant shows that there is a serious error or miscarriage of justice the Award should not be set aside. Although tempting I will not embark on a long and protracted analysis of the applicant's submission. Instead, it is proposed to deal with each of the main heads of claim generally and in doing so will adopt the applicant's format of submissions. The applicant's submissions with regard to the Arbitrator's Award on the applicant's counterclaim will be discussed first before discussing the applicant's submission with regard to the Arbitrator's Award on the respondent's claim.

[8] Firstly, the applicant's contends that the Arbitrator unfairly dismissed the whole of its counterclaim without even going into the merits of the counterclaim. I think this contention is not only baseless, it is incorrect. The Arbitrator did indeed find that the employer/applicant does not have a right to refer disputes to arbitration under cl 54 of the conditions of the PWD 203A contract. However, more importantly, the Arbitrator also found, irrespective of his findings on the right to refer, that the applicant did not refer the counterclaim to the SO as is required under cl 54 and therefore, even if the

applicant did have a right to refer disputes to arbitration, the spplicant had not complied with a condition precedent, (para 16.7 of the Award). The Arbitrator also found that time had become at large and therefore the applicant no longer had a right to deduct Liquidated and Ascertained Damages ('LAD'), (para 16.28 of the Award). The Arbitrator also found from the facts and evidence that were put before him, that there was not a valid certificate of non-completion issued by the SO and as this condition precedent to the employer's right to deduct LAD as provided for in cl 40 of the conditions of contract had not been complied with, the employer did not have a right to deduct LAD. (para 16.35 of the Award). These are the four reasons as to why the applicant's counterclaim was dismissed which are all nearly and succinctly summarized by the Arbitrator and at least three of them deal with the merits of the case (para 16.42 of the Award).

[9] The applicant also contends that the Arbitrator erred in law in his construction of cl 54 of the conditions of contract. Before I proceed to show why this contention by the applicant is wrong, it is necessary to appreciate the events that occurred during the course of the arbitral hearing that are directly relevant to the applicant's counterclaim. Firstly, I refer to para 8 of the respondent's first affidavit (encl 3) and to Appendix One of the Award (exh MPS-6 of encl 2). During the course of the arbitral hearing, the issue arose as to whether certain differences had been properly referred to arbitration. It was contended by the applicant/employer that the respondent/contractor's claims nos. 14 and 19 were not properly referred to arbitration and that also, in its defence of the contractor's claim no. 4, it was entitled to ask the Arbitrator to open up EOT Certificate No. 1 which extended the time of completion of the Works. The respondent/contractor on the other hand stated that the Certificate of EOT No. l could not be reviewed and revised because it had not been properly referred to arbitration. Therefore, as a preliminary matter, the parties had required a decision from the Arbitrator on whether the three claims had been properly referred to Arbitration in accordance with the terms of the Contract ('the Three Issues') and by agreement between the parties, three questions were framed and skeletal as well as oral submissions were made to the learned Arbitrator. An interim award was given by the learned Arbitrator on 20 June 2000 on the interpretation of cl 54 known as the 'Decision on Three Issues — Whether Certain Matters Have Been Referred to Arbitration' which is annexed to the Award on liability as Appendix One (pp 458–466 of encl 2). The Arbitrator found, having heard both parties by way of written skeletal and oral submissions, that there was no express procedure for the applicant to bring a claim to arbitration and concluded that the applicant did not have the right to bring an issue to arbitration under the PWD 203 (rev 10/83) form of contract. Therefore, the applicant did not have the right in this arbitration to ask the arbitrator to review and revise the Certificate of Extension of Time No 1 (p 464 of encl 2 — items 14 to 20). This interim award is final and binding on the parties, no application having been made within six weeks after the award was made and published to challenge it as required by O 69 r 4(1) of the Rules of the High Court 1980. Further, it is also important to note that the applicant did not at any time make any application under s 22 of the Act to have the Arbitrator state the question for a decision of the High Court. Having referred the specific question

of whether the three issues had been properly referred to arbitration, it was then open to either party to ask the learned arbitrator to state a special case for the court's decision. Nik Hashim JC (as he then was) in *Usaha Damai Sdn Bhd v Setiausaha Kerajaan Selangor* [1997] 5 MLJ 601 held as follows at p 602:

> If the applicant was not confident in the arbitrator's ability to decide on issues of law, it could have requested the arbitrator to find the facts and state the issues of law for the decision of the High Court pursuant to s 22 of the Arbitration Act 1952. Since this has not been done, the applicant could not therefore ask the court to review the same.

[10] Neither did the applicant at any material time make any application to the courts to challenge the learned Arbitrator's decision on the three issues which revolved around the construction of cl 54 of the conditions of contract. The construction of cl 54 is a specific question of law that had been referred to the Arbitrator and the court will not interfere with the Arbitrator's decision on the ground that it is erroneous in law. (See *Sharikat Pemborong Pertanian v Federal Land Development Authority*). Therefore, clearly the applicant is not in a position to ask this court to review the Arbitrator's decision on the interpretation of cl 54.

[11] In any event, I will now deal with the applicant's substantive submissions on the Arbitrator's interpretation of cl 54. Firstly, the Applicant contends that the learned Arbitrator erroneously interpreted cl 54 of the conditions of contract (ie the arbitration clause) by concluding that only the contractor may refer disputes to arbitration, and not the employer. The applicant says that the Arbitrator wrongly construed cl 54 and that he failed to appreciate that cl 54 merely sets down formalities the contractor will need to follow in order to bring a claim to arbitration. The Applicant does however accept that the Arbitrator came to his conclusion based on the construction of the wording of cl 54. The construction of cl 54 is a matter that has been the subject of proper submissions before the learned Arbitrator. As stated above, parties had put in written skeletal submissions as well as made full oral submissions before the Arbitrator on the Three Issues. In any event, apart from the fact that the wording of the cl 54 is clear and unambiguous, the Arbitrator's reasoning in his decision on Three Issues which was reproduced in the Award at paras 16.5 to 16.17 is sound, cogent and clear. I would like to refer to para 10–20 of Appendix One to the Award where the Arbitrator systematically and cogently set out his arguments and reasons as to why the employer does not have the right to ask the arbitrator to review and revise the Certificate of EOT No 1. In fact, the Arbitrator made it clear that the employer is not however prevented from raising issues and adducing evidence to rebut the claim for loss and expense. It is just that as the employer had not previously challenged the EOT Certificate No 1, it could not then seek to review and revise a certificate as a defence to a claim for loss and expense which arose out of an EOT which had not been challenged previously. The applicant has not shown any misconduct on the part of the Arbitrator. The applicant merely disagrees with the Arbitrator's decision, and whilst this may be unfortunate, it is not something that is within this court's jurisdiction to remedy. Raja Azlan Shah J (as DYMM then was) in *Sharikat Pemborong Pertanian v Federal Land Development Authority* stated at p 211 as follows with regard to argument by counsel on the correct interpretation of a letter:

> In my opinion the question is one of construction and of applying it. As long as it is capable of a meaning it will ultimately bear that meaning that which the arbitrator decides is its proper construction, and the arbitrator will decide its application. Assuming that the arbitrator had erred in interpretation, that in my opinion was only a mistake on his part. That per se is not sufficient as a ground to set aside the award.

[12] Secondly, it has to be borne in mind that the applicant did not at any material time make any application to the courts to challenge the learned Arbitrator's decision on the Three Issues which was a question of the proper construction of cl 54 of the conditions of the contract. It follows therefore that if the applicant, having not challenged the Arbitrator's decision on cl 54 in relation to the Three Issues, the applicant necessarily accepts the Arbitrator's decision on cl 54 in all situations, which is also applicable to the counterclaim. It is therefore noted that the applicant's application herein to challenge the learned Arbitrator's decision on the construction of cl 54 with regard to the counterclaim, is filed out of time and should be dismissed in limine and I hereby do so.

[13] Next, the applicant contends that the Government of Malaysia's right to refer disputes to arbitration under the PWD 203A contract form must be implied from trade practice. However, the applicant does not say what this trade practice is. For the applicant to merely say that it is inconceivable for the Government of Malaysia not to have referred any disputes to arbitration is not good enough. This is merely conjecture. The applicant must show that the trade practice is that the Government of Malaysia has been regularly referring disputes to arbitration under the PWD 203A contract form. No evidence was ever led at any point in time by the applicant on this issue. In any event, it is not for the learned Arbitrator to imply terms into a contract that are clear and unambiguous merely because it is something that may be practised by some. This was one of the reasons given by the Arbitrator and this surely cannot be misconduct on the part of the Arbitrator (para 16.14 of the Award). The mere fact that there are no reported cases where the jurisdiction of the arbitrator is challenged is not conclusive evidence of anything. It could be brought about by the fact that the trade practice is in fact that the Government of Malaysia does not refer matters to arbitration. In fact, clauses allowing only party the right to refer matters to arbitration are not unusual and are valid and binding. In *Pittalis & Others v Sherefettin* [1986] QB 868, the English Court of Appeal held that since the lease in question contained an agreement between the parties that a future dispute concerning the amount of rent payable should be referred for determination in accordance with the provisions of the Arbitration Act 1950, there was an agreement to arbitrate, notwithstanding that the right of reference was unilateral and not bilateral. Fox LJ in *Pittalis & Others v Sherefettin* stated as follows at p 875:

> ... I can see no reason why, if an agreement between two persons confers on one of them alone the right to refer the matter to arbitration, the reference should not constitute an arbitration. There is a fully bilateral agreement which constitutes a contract to refer. The fact that the option is exercisable by one of the parties only seems to me to be irrelevant.

[14] On the issue of waiver or estoppel by conduct, I must say firstly, it is not disputed that parties may by conduct confer jurisdiction on to an arbitrator even if such jurisdiction is outside the arbitration agreement. However, the applicant's contention that such an agreement could have been inferred from the parties' conduct during the arbitral proceedings is not correct. As stated above, in the course of submissions on the Three Issues, the construction and the principles of cl 54 were thoroughly canvassed by both parties. The fact that the Three Issues were not in relation to the applicant's counterclaim per se, and were actually in relation to the respondent's claims, does not detract from the fact that the issue of an employer's right to refer matters to arbitration under cl 54 has been properly argued before the Arbitrator. By challenging the applicant's right to open up the extension of time granted by the SO the respondent had from the conception of the arbitral proceedings taken the position that the employer did not have the right to refer matters to arbitration under cl 54 of the PWD 203A contract form. In fact, this was expressly contended by the respondent. Reference is made to the respondent's skeletal submissions on the issue of jurisdiction during the hearing of the Three Issues (exh NCA-3: encl 3 at p 20 item 1(e)). As is evident, the respondent clearly and expressly pointed out that the applicant does not have a right to refer disputes to arbitration. It cannot now be said that there was agreement on the part of the respondent that the applicant/employer be allowed to refer the counterclaim to arbitration. The applicant's contention that the respondent had not taken any steps to challenge the jurisdiction of the Arbitrator to decide on the counterclaim is wrong. Secondly, the issue of waiver or estoppel was never raised by the applicant prior to this application. The plea of waiver and estoppel is not contained in the applicant's submissions on the Three Issues in June 2000 nor was it made at any time in the course of the arbitration proceedings. It is the applicant itself who has waived its right and is now estopped from challenging the learned Arbitrator's decision on its jurisdiction to hear the counterclaim, which jurisdiction was in any event specially conferred on the Arbitrator when both parties asked him to decide the question relating to the Three Issues. Lord Denning's statement in *WJ Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189 which was adopted by the Federal Court in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 at p 347 is as follows:

> If one party by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on strict legal rights when it would be inequitable for him to do so.

[15] In fact, the Three Issues, all of which dealt with the jurisdiction of the learned Arbitrator, were jointly prepared by parties' counsel for the arbitration. Two of the Three Issues were raised by the applicant's counsel. The fact that the Three Issues were dealt with together and prior to the submissions that led to the Award on liability clearly demonstrates that there is no merit in the applicant now, at this late stage, raising questions of waiver and/or estoppel. To permit the applicant to do so now would be unjust to the respondent.

[16] On the issue of misconduct, the applicant contended that the Arbitrator had failed to take into account 'the material and relevant evidence or submission

of the counterclaim to him' (para 3.4.1:AS) and this is clearly untenable. The point of the employer's right to refer disputes to arbitration had already been put to the parties. Whether it is in relation to the applicant's counterclaim or the respondent's claim does not detract from the fact that the point has already been brought to the parties' attention. As stated above the Arbitrator had also found other reasons as to why the applicant's counterclaim should be disallowed, irrespective of his findings on the applicant's right to refer, namely that:

(i) the applicant did not refer the counterclaim to the SO as is required under cl 54 and therefore, even if the applicant did have a right to refer disputes to arbitration, the applicant has not complied with a conditions precedent (para 16.7 of the Award);

(ii) time had become at large and therefore the applicant no longer has a right to deduct liquidated and ascertained damages (para 16.28 of the Award);

(iii) there was no valid certificate of non-completion issued by the SO and as this condition precedent to the employer's right to deduct LAD as provided for cl 40 of the conditions of contract has not been complied with, the employer does not have a right to deduct LAD (para 16.42 of the Award).

[17] I think there is clearly no misconduct on the part of the Arbitrator. The Arbitrator had not decided the case on any point that was not put to the parties and as such, the Award cannot be set aside. The applicant has not shown that the Arbitrator had failed to take into account any material and relevant evidence or submission. In fact, the Arbitrator is not required to mention all and every piece of evidence and questions of law and fact in his award. He only needed to refer to material and relevant evidence to suit the key question to the dispute (see *Sharikat Pemborong Pertanian v Federal Land Development Authority*). This was done by the Arbitrator. There is no injustice or unfairness suffered by the applicant. Irrespective of its rights to refer, the Arbitrator heard the applicant anyway before he dismissed its counterclaim. The applicant's contention purportedly supported by the cases *Societe Franco Tunisienne D'Armement Tunis v Government of Ceylon* [1959] 1 WLR 787 and *Interbulk Ltd v Aiden Shipping Co Ltd ('The Vimeira')* [1984] 2 Lloyd's Rep 66 is untenable and the cases irrelevant.

[18] On the failure to consider the innocent party's right to repudiatory breach situation, this is again in relation to the applicant's counterclaim, which is its claim for liquidated and ascertained damages (LAD) for a period of 902 days, that is from the revised completion date until the date the mutual termination agreement was signed on 18 1995. The Arbitrator found that time was at large and therefore the applicant had no right to deduct LAD. The applicant does not dispute this. Instead the applicant is saying that the arbitrator erred in law by not finding that the contractor had repudiated the Contract by slowing down and suspending the Works. Whether or not there was actually repudiation per se, is not in issue. Clause 51(a)(i) of the conditions of contract provides that if the respondent/contractor suspends the works without reasonable cause, then the applicant/employer may after proper notice, determine the employment of the respondent/contractor (exh MPS-1

of encl 2 at p 66). The Arbitrator found that the applicant did not avail itself of the powers to determine the respondent/contractor's employment under cl 51(a) of the conditions. As such, it had tacitly accepted any slowing down of the Works by the respondent and therefore the contract was not terminated by such reason. From this, the Arbitrator then found that the SO had no power to certify an extension of time during the period in which Works are suspended, and therefore, as the contractor was not at fault (the Arbitrator having found that the employer had accepted the suspension) and as no extension of time could be given, time became at large. With time at large, the applicant/employer lost its right to deduct LAD. This is cogent, sound reasoning. For the applicant to say that the Arbitrator misconducted himself because he came to the conclusion that there was no repudiation is wrong. On the applicant's counsel submission that the words 'I am not prepared to make a finding on this point ...' cannot mean that the finding was that there was no repudiation. Also, to say that there was contradiction of the Award is also wrong, because 'oral highlighting' of written submissions cannot mean that the point was 'fully argued' before the Arbitrator as contended by the applicant. In any event, the applicant's reliance on *Supamarl Ltd v Federated Homes Ltd* (1987) 9 Con LR 25 and *Cantebury Pipe Lines Ltd v Christchurch Drainage Board* (1979) 16 BLR 76 is misplaced. Whilst slowing down in the face of non-payment of the employer does amount to a repudiation of the contract by the contractor, whether or not there is repudiation per se is not in issue, as there has been no acceptance of such repudiatory breach by termination of the contract. As to the applicant's contention that the Arbitrator ignored its right to elect to affirm the contract and seek damages, it is noted that the applicant's counterclaim is for liquidated and ascertained damages (LAD). In fact, the applicant's contention that it may have been electing to affirm the contract and seek damages is clearly I think an afterthought. At the risk of going through the evidence again, it may however be necessary to show that this contention of the applicant's was never thought of at the time of the suspension or slowing down of the Works, and as such the arbitrator's finding that the applicant had tacitly accepted the suspension is correct. It is necessary to note that all the interim certificates issued by the SO were not subject to any LAD. It is also accepted that the respondent stopped work on 22 January 1993. Meanwhile, interim certificates were issued by the SO without any deduction for LAD and payment was duly made (except for Certificate No 42) by the applicant. Not only did the applicant continue releasing payment to the respondent after 22 January 1993, ie the day the respondent stopped work, the applicant also made no attempt to call on the performance bonds that it was holding at the material time in respect of the three contracts. Had the applicant done so, its counterclaim would not have arisen and it would be up to the respondent to refer this issue to arbitration. I am of the opinion that the applicant cannot raise such issues at this stage.

[19] On the failure to consider general damages regardless of LAD, I think the Arbitrator had already found that they were not entitled to claim LAD as time had become at large. Whether or not the applicant can now claim for general damages, was never a matter raised or thought of by the Applicant during the arbitral proceedings. From the applicant' skeletal submissions (exh NCA-3 encl 3 at p 23), it is evident that the applicant did not raise the

issue of general damages during submissions at the arbitral hearing. It would also appear that neither did the applicant attempt to adduce any evidence or demonstrate that the respondent had committed a breach of contract that would give rise to a right of general damages for delay. In *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* 1 BLR 111 at p 112 it is stated:

> If the employer is in any way responsible for the failure to achieve the completion date, he can recover no liquidated damages at all and is left to prove such general damages as he may have suffered.

[20] Here, the applicant made no attempt to show the general damages that it may have suffered. For the applicant to do so now is clearly an attempt to treat this application as an appeal and make fresh submissions on matters which it could clearly have done so before.

[21] I therefore come to the conclusion that none of the reasons put forward by the applicant are tenable or in any way point to a serious miscarriage of justice to justify a conclusion that the Arbitrator's Award on the counterclaim should be set aside. Nik Hashim JC (as he then was) in *Usaha Damai Sdn Bhd v Setiausaha Kerajaan Selangor* found that the applicant's complaints were unsustainable as all matters referred to the arbitrator were conclusively decided by him and the award was certain and unambiguous. The learned Arbitrator in this matter also conclusively decided all matters referred to him and the Award in this present application is also certain and unambiguous. There is no reason to justify the setting aside of the Award.

[22] Talking about crossing major roads I think apart from the fact that the applicant appears to be resubmitting on the same issues that it had previously submitted to the Arbitrator and therefore attempting to turn this application into an appeal process, the applicant's claims that the Arbitrator has misconducted himself by allowing the respondent's Claim No. 1 is unfounded. Firstly, reference is made to paras 4.19 to 4.27 of the Award. The Arbitrator's findings on the need to imply a term into the Contract to give it proper business efficacy has been properly reasoned. The Arbitrator had succinctly framed the issue in contention, took into account the evidence of the applicant's and respondent's witnesses, gave weight to both counsel's submissions and explained why he could not agree with the applicant's counsel before he made his findings (paras 4.9–4.18 of the Award). The Arbitrator's findings are sound and cogent. Secondly, cl 8 of the conditions and cll 1.3, 1.10 and 1.28 of the specifications are not at all relevant to the facts at hand. Clause 8 of the conditions deals with the sufficiency of the contract documents, in that they are all mutually explanatory of one another (exh MPS-1 encl 3 at p 52). Clause 1.3 of the specifications stated that the specifications were intended to cover supply of all materials and execution of all works necessary to complete the Works (exh MPS-1 encl 3 at p 108). This would include materials like nails for fixing formworks, tying wires for reinforcement and spacer blocks for concreting. Clause 1.3 of the specifications also referred to '... details of construction or materials which have not been referred to in this specification, BQ or drawings, but the necessity of which may be reasonably be implied or inferred ...'. The crossing of major roads was specifically and expressly mentioned under cl 26.3 of the preamble to the BQ. It is difficult to see how it should now fall within

this cl 1.3 of the specification as contended by the applicant. Clause 1.10 stated that the contractor shall ensure that there is no unnecessary inconvenience caused to the roads at the contractor's own expense (exh MPS-1 encl 3 at p 112). Clause 1.28 stated that the failure to price any item merely means that the cost of the item is to be found elsewhere in the bills (exh MPS-1 encl 3 at p 117). The issue was whether the respondent was entitled to additional payment for crossings under major roads which happened to be on an embankment. This came about because preamble cl 26.6 of the Bill of Quantities (exh MPS-1 encl 3 at p 93) stated as follows:

> Extra over lump sum items have been provided ... for major crossings below rivers, railway track, large culverts, major road embankment etc ... .

[23] The Arbitrator found that the respondent was entitled to payment only if the specific location was a major crossing, a major road and that the major road was on an embankment. There was no need for the Arbitrator to take into account the clauses mentioned above in making his finding as they were clearly irrelevant to the issue at hand. Thirdly, the Applicant did not raise these provisions during its submissions on liability on Claim No l. By doing so now, the applicant is clearly treating this application as an appeal process. In any event, the applicant should be now estopped from raising these arguments in this present application. If this court were to take into account the applicant's contentions on these provisions at this stage, effectively what this court is expected to do is to re-hear the claims and to go through all the available evidence once more, which is not the function intended by s 24 of the Arbitration Act 1952. It should also be pointed out that the applicant's contention that the respondent had accepted the meaning of cl 26.3 as stated by the applicant is incorrect. It is noted that it is and has always been the respondent's contention that it was the intention of the parties that the respondent would be reimbursed for sewer installations crossing all major roads and not only to specific pipe crossings (exh NCA-4 encl 3 at p44/paras 4.6 and 4.8). In fact there were also other items that were not provided for in the BQ but were certified for payment by the SO and subsequently paid for by the applicant (exh MP:S-3 encl 3 at p 244). The applicant's contention that the Arbitrator ignored the objective intention of the parties is clearly wrong. The applicant is placing a great deal of emphasis on the Arbitrator's choice of words where he stated that the Contract was 'not sensible' and therefore by saying this, he was not appreciating the need to ascertain the objective intention of the parties from the wording of the Contract. This is clearly wrong. A plain reading of the Award will show that the Arbitrator, having heard the evidence, not only found that without the implied term, the Contract was not sensible but also 'not ... such that the parties must or can have implied ...' and then goes on to explain why he thinks so (para 4.27 of the Award). I think the Singapore Court of Appeal in *The Attorney-General of Singapore v Wong Wai Cheng* [1980] 1 MLJ 131 did not just hold that the failure to construe the contract amounted to an error of law for the award to set aside as stated by the applicant. The Singapore Court of Appeal also held that it was failure to construe the contract as well as to consider all the facts and circumstances of the case that amounted to an error of law apparent on the face of the award. Nevertheless, the Arbitrator

clearly construed the provisions of the Contract, and found the provisions referred to by the applicant irrelevant, which they were. He also clearly took into consideration all the facts and circumstances of the case. This is evident on the face of his award where he refers to and gives weight to both parties' witnesses. It is unclear as to what the applicant means when it submits that the Arbitrator failed to decide on all matters or issues referred to him specifically by not deciding which items under Claim No 1 fall within the three criteria set out in para 4.29 of the Award. Having decided that the respondent was entitled to additional payment for major crossings under major road which were on embankment, the Arbitrator then went on to list out the specific requirements for any specific location to qualify for payment, that is, a specific location must be:

(i) a major crossing;

(ii) a major road and

(iii) the major road must be on embankment.

[24] The Arbitrator then gave a direction for parties to identify and agree on the locations that fulfil these three specific requirements so as to qualify for payment. Notwithstanding the fact that the evidence as to which locations fulfil the three specific requirements would not have even been before the learned Arbitrator, nor would it have been fully argued before the Arbitrator, the Arbitrator's direction was a logical and sound direction. The Arbitrator, after deciding on what the requirements were for a location to qualify for payment, then asked parties to identify those locations before the hearing on quantum. This I am of the view cannot be said to be an 'unauthorised direction to the parties'.

[25] On the road overbreak and settlement, I should state that firstly, I note that the applicant's submissions make great reference to the pleadings and submissions made by parties during the arbitration proceedings. It cannot be over-emphasized that this application is not a re-hearing of the arbitration. Secondly, the applicant's submission that the Arbitrator failed to appreciate the real issue had turned on the construction of the Contract clauses as to who bore the risk of adverse ground conditions is untenable. Reference is made to para 5.13 of the Award:

> The respondent's (applicant) first submission is that the principle issue here is who bears the risk of adverse ground conditions under the terms of the contract. With this I do not disagree.

[26] Each paragraph of the Award cannot be read in isolation. The Arbitrator had stated in para 5.2 of the Award that 'it is the claimant's (respondent) contention that it should be entitled to be compensated for this overbreak and the expense of dealing with the settlement' and then, logically, divides the claim into two constituent parts, the occurrence of overbreak and settlement. The Arbitrator then decided that when overbreak was considered in isolation, there was no obligation on the applicant to compensate the respondent for each square meter of road reinstatement outside the limits claimed (para 5.26 of the Award). However, given that the respondent/claimant was claiming compensation for overbreak as well as the expense of dealing with settlement,

the Arbitrator rightly decided that matters turn out differently with settlement. The Arbitrator also pointed out that the issues as to how the settlement came about and how it was dealt with over a period of time would make a difference to the parties. This then leads us to the Arbitrator's findings on the settlement of the road surface. The Arbitrator considered each contract provision and requirement in relation to parties' liabilities clearly and thoroughly, (paras 5.30–5.44 of the Award). The applicant's contention that the Arbitrator did not give any notice to the parties of his findings as to the difference in the areas under the jurisdiction of the applicant and JKR is untenable. As stated above, the Arbitrator made a finding that the way in which the settlement came about and how it was dealt with made a difference to the parties. The Arbitrator also found that there were occasions when the respondent was obliged to follow the instructions of the local authorities and government departments which were plainly at odds with the contractual obligations, after seeking the instructions of the SO. In these situations, the Arbitrator found that the respondent was entitled to a variation for the additional costs arising from such compliance (para 5.51 of the Award). It necessarily follows that the different areas would fall into areas within the applicant's control and areas that were not within the applicant's control, ie under JKR's jurisdiction. What is important is how settlement in these different areas were dealt with by the applicant. As to the applicant's submission that the Arbitrator erred in law in making a decision based merely on what is a fair result, again, it is emphasized that each paragraph of the Award cannot be read in isolation. It may be useful to set out the relevant parts of the Award:

(i) The Arbitrator found that in areas under the jurisdiction of the applicant, sand backfill was required, followed by temporary reinstatement using asphalt (para 5.48.1 of the Award);

(ii) In this area, where the material was removed and sand was placed in the voids formed, it is to be paid for under the apposite bill item (para 5.49 of the Award);

(iii) In this area, where the respondent was instructed not to place sand, ie a positive instruction by the applicant, the applicant could not have had it both ways and expected the respondent to bear the additional cost of temporary reinstatement followed by topping up prior to permanent reinstatement. Therefore, the respondent was entitled to the additional cost of reinstatement over that contemplated in the contract (para 5.50 of the Award).

[27] The express condition of the Contract was that backfilling should be finished off slightly proud of the surrounding ground to allow for settlement and the respondent is to maintain the level of fill until no further settlement occurs (exh MPS-1 encl 2 at p 135/cl 3.12.6(a)). If sand was not used as backfill, this would result in the respondent having to bear additional costs for temporary reinstatement as opposed to if sand were used. The Arbitrator held that if sand was not used as a result of the Applicant's instructions, then this additional cost should not have to be borne by the respondent. In fact, in paras 5.13, 5.6 and 5.22 of the respondent's written submission (exh NCA-4 encl 3 — pp 50–51), the respondent contended that any adverse

conditions encountered should be treated as a variation under cl 25 of the conditions of contract. The execution of the road reinstatement had deviated from the specifications, ie immediate reinstatement instead of waiting until no further settlement of the fill as specified. They were not executed under similar conditions as was contemplated at the time of tender. Therefore, the applicant's contention that the Arbitrator did not base his decision on any legal entitlement is clearly unsupportable. It is also incorrect to say that the Arbitrator's findings in this respect is in direct contradiction with his earlier finding that the respondent bears the risk of adverse ground conditions. The risk remains with the respondent. If the respondent had used sand it would not have been entitled to any additional cost of temporary reinstatement. It is only when the applicant ordered the respondent not to fill with sand thus causing the respondent to incur additional cost, is the respondent entitled to payment of these additional costs. This is once again clear, sound and cogent reasoning by the Arbitrator of his Award. Talking about the failure to take into account contract provisions, it is unclear how the applicant finds cll 1.9 and 1.10 of the specification relevant to the issue at hand. Clause 1.10 of the specification dealt with unnecessary inconvenience that may have been caused to the public or road users and provided that all costs of licences and permits required to block, obstruct or close any roads shall be borne by the respondent. When the SO wrote to the respondent informing it to adhere to JKR's requirements that 'reinstatements are to be carried out on the same day', contrary to the provisions of the contract, the issue of whether licences and permit for road blocks are issued and who should bear the cost does not arise and is irrelevant. I view this as not a serious error of law and is definitely not a reason to set aside the Award.

[28] On the right to reimbursement for delay, I observed that the Arbitrator did find that cl 44 of the Contract only permitted recovery of direct loss and expense incurred in respect of the three examples listed and that none of these were grounds for the respective extensions of time. The learned Arbitrator also found that cl 44 did not prohibit recovery of direct loss and expense elsewhere, be it within the contract or pursuant to common law. In coming to this conclusion, the Arbitrator stated that he was led by the express wording of cl 44 which expressly refers to payment made under other provisions of the contract (paras 7.26–7.27 Award).

[29] On the different specie of claim, I should state that firstly, although the claim by the respondent was entitled 'Claim for Preliminaries', the respondent had pleaded its entitlement under both cll 5 and 44 of the Contract (exh MPS-3 encl 2 p 257). Clearly the learned Arbitrator had taken cognizance of the substance of the claim as he properly did and not merely by its label or heading. The relief granted by the Arbitrator did relate to a matter which was referred and was not outside the arbitrator's jurisdiction to decide upon. After finding that cl 44 did not prohibit recovery of direct loss and expense elsewhere, the Arbitrator then went on to reason his findings on cl 5; that is, whether the respondent/contractor was able to recover under cl 5 and if so, the circumstance under which the respondent could so recover, (paras 7.31 to 7.35 of the Award). This is cogent, and sound reasoning by the Arbitrator and there was no error in law in his finding. In any event, this finding that

the respondent was able to recover under cl 5 was a result of matters already addressed to during submissions on liability. It is not for the applicant to raise it again at this forum.

[30] On the misconstruction of contract clauses, I must state that firstly I would like to refer to paras 7.16 to 7.24 of the Award. It is evident that the issue of cl 44 was exhaustively argued by both parties before the Arbitrator. It is also evident that the Arbitrator gave due consideration to both parties' contentions before he came to his finding. What the applicant is essentially attempting to do here is to re-submit on the issues before a different forum by disguising it as a misconstruction on the part of the Arbitrator of specific provisions of the Contract. The Arbitrator's award set out clearly and methodically the issues, each parties' submissions and his findings after he considered each parties' submissions. By saying that the Arbitrator misconstrued the provisions of the Contract, what the applicant is really saying is that the Arbitrator misconstrued the contract provisions simply because the Arbitrator did not agree with its submissions. In any event, cl 44 of the Contract provided for a situation where the regular progress of Works has been affected by the three reasons stated and the contractor has incurred loss and expense for which he could not be reimbursed by payment under any other provision of the Contract. Having found that the three reasons as stated in cl 44 did not apply to the respondent's claim, the Arbitrator rightly found that cl 44 did not exclude a right to recovery elsewhere. In reaching this conclusion, the Arbitrator stated that he was led by the wording of cl 44 itself. The Arbitrator's reasoning cannot be defaulted. In fact, all these arguments have already been put forward to the Arbitrator and as is apparent on the Award, the Arbitrator had carefully analyzed and meticulously appraised the relevant issues before him.

[31] On the extension of time not claimed, I observe that the applicant contended that the Arbitrator was acting in misconduct and/or in excess of his jurisdiction and the respondent was claiming for preliminaries and not extension of time. Reference should be made to paras 7.37–7.40 of the Award. In respect of Package 106, the Arbitrator rightly observed that the respondent was claiming for preliminaries for the intervening period from 29 September 1992 (the extended date of completion) to 22 January 1993 (the date work at site was discontinued) on the grounds that it was entitled to an extension of time for this period. In order to decide whether or not the respondent was entitled to preliminaries for that period, it was necessary for the Arbitrator to first decide whether or not the respondent was entitled to an extension of time from 29 September 1992 to 22 January 1993. Once again, the fact that each paragraph of the Award cannot be read in isolation cannot be over-emphasized. The applicant submits that the Arbitrator's findings at paras 7.70 and 7.35 of the Award are patently inconsistent. At para 7.35, the Arbitrator found that the respondent is entitled to reimbursement pursuant to cl 5 if it can establish certain requirements. As stated above, it was necessary for the Arbitrator to consider whether any extension of time should be allowed for the period between the extended completion date and when work was suspended. The Arbitrator also stated in para 7.63 of the Award that the fact that there is an entitlement to extension of time does not automatically

favour the claimant with reimbursement without proof of loss and expense. The Arbitrator also found that all the extensions were certified pursuant to cl 43(e) which provides 'by reason of SO's instructions issued under cl 5 hereof, provided that such instructions are not issued due to any default or breach of contract by the contractor … and the Arbitrator rightly observed that if an extension had been given by reason of the SO's instructions, then such instructions could not have been issued as a result of the contractor's breach or default. Therefore, if the extensions were certified pursuant to cl43(e), it follows that the requirement of cl 5 is satisfied, and upon the requirements of cl 5 being satisfied, the respondent is thus entitled to reimbursement. The Arbitrator's findings in para 7.70 of the Award then sets out the periods of extension of time over which the respondent is entitled to be reimbursed for any additional loss and expense. When all the paragraphs of the Award are read together, there is clearly no inconsistency in the Arbitrator's findings. What is evident is that the Arbitrator had taken into account all the relevant issues, dealt with them thoroughly and made proper and reasoned findings on all the issues. Again, the applicant has not shown any reason why the Award should be set aside.

[32] On the breach in slowing down work, I observe that the Arbitrator did not fail to appreciate in law the fact that it is a breach of contract for the respondent to slow down works. The Arbitrator accepted that it may have amounted to a repudiation but then held that even if it did, the applicant did not take advantage of the remedies made available to it under the Contract. The Applicant's contention in para 4.3.22 of its submissions that the Arbitrator did not consider cl 51(a)(ii) is clearly wrong.

[33] On the failure to give notice, I observe that this contention by the applicant that the arbitrator did not take cl 43 into account cannot be accepted. I would like to refer to paras 7.47 to 7.53 of the Award. At the risk of repeating the Award, it is clear that the Arbitrator directed his mind to the issue as to whether notice was given forthwith. The Arbitrator also directed his mind to the two cases that was referred to by both parties and decided that he was unable to concur with the applicant that no notice was given or, where notice had been given, it was inadequate. In short, the Arbitrator had made a finding on the facts and law that adequate notice had been given, and this finding should not be disturbed by this court.

[34] On the contradiction in findings, I would say that this is a poor attempt by the applicant to find fault with the Arbitrator's reasoning and Award. It is not clear what the contradiction complained of by the applicant is. In any event, it may be worth pointing out that in para 7.62 of the Award, the Arbitrator found as fact that the respondent was, 'through no fault of its own, prevented from executing the Works to completion because of obstructions and other matters' and that these other matters continued to exist at the time the respondent stopped work. In para 7.64, the Arbitrator then concludes on the evidence that the delays were caused by reasons of the SO's instructions. The respondent is unable to comprehend the contradiction complained of by the applicant.

[35] On JKR permit, it is observed that this is the respondent's claim for loss and expense which was caused by the failure of the SO in obtaining an

excavation permit from JKR. The Arbitrator rightly and succinctly set out the issues at para 8.9 of the Award. The applicant is claiming that the Arbitrator failed to take into account express Contract provisions in his Award. I would firstly like to refer to para 8.14 of the Award where the Arbitrator set out the applicant's submissions, which basically stated that the applicant was relying on cl 11(c) of the conditions of contract and cll 1.9 and 1.10 of the specification. The Arbitrator also noted that these precise provisions were not cited by the spplicant's counsel in his submissions. I see that the applicant now takes this opportunity to set out the provisions in full before this court in an attempt to re-open its case and re-submit on the same issues. It is clear from the face of the Award that these were matters that were addressed by parties in evidence and the submissions on liability during the arbitration proceedings and which the learned Arbitrator has found to be immaterial to his decision and is rightly so. The contract provisions on compliance with written law and road blocks have nothing to do with the respondent's claim that as a result of the delay on the part of the SO in forwarding the application to JKR, the respondent suffered loss and expense. Further, this finding that the delay in obtaining the permit was caused by the SO was a finding of fact. This finding of fact cannot be disturbed by this court.

[36] When a statement is taken out of context, it is easy to read any errors into it. The applicant's contention is whether the Arbitrator misdirected himself on the burden of proof when he required the applicant to demonstrate that the respondent could have mobilized his team elsewhere (para 8.19 of the Award). If para 8.19 of the award is read properly, it will become evident that this direction by the Arbitrator was in response to the applicant's submission that the respondent could have mobilized its gang elsewhere and there was no need for it to be idle. Having raised this, it is trite law that the burden of proving such a contention therefore rests on the applicant. The Arbitrator had found that the delay on the part of the SO for which the applicant is responsible for caused the respondent's pipe gang to be idle. It is not for the respondent to prove that it could have mobilized its team elsewhere. Further, the Arbitrator also then stated that the respondent must show in the assessment of quantum that all the loss and expense claimed was properly incurred. This is cogent and sound reasoning. There is no inconsistency. Neither is there ambiguity and inconsistency in the Award. The applicant's contention otherwise is wrong.

[37] On the loss productivity I should state once again, that the applicant is re-submitting on the same issue. It is setting out the same contractual provisions it relied on during the arbitration proceedings and is claiming that the Arbitrator wrongly construed these contractual provisions. Apart from the fact that this application is not meant to be a re-hearing of the applicant's submissions, even if it were, the applicant had either inadvertently or deliberately misunderstood the Arbitrator's findings and taken each finding out of context. Firstly, the applicant contended that the Arbitrator misconducted himself by construing that the contract provisions were limited to conditions existing at the time of tender when there was no express words limiting their effect to conditions at time of tender (para 4.5.4 AS). Reference is made to paras 9.18 and 9.19 of the Award. The Arbitrator acknowledges

that the contractual provisions would have carried great weight if they were applied to a set of circumstances existing at time of tender. The Arbitrator also stated that after a careful study of the provisions, he found that not one of these provisions attempts to place the risk on the respondent/contractor for a situation where pipes are laid after the tender. The Arbitrator also observed that the applicant's own witness confirmed that the JPA pipes would require an excavation permit from the applicant. This is a cogent and sound reasoning and the proper meaning and construction of the contractual provisions and these findings cannot be disturbed. What the applicant is attempting to do is to ask the court to make another finding on the contractual provisions and it is not within the court's jurisdiction to do so. Secondly, the applicant seeks to rely on cl 26.6 of the Preamble which deals with the final alignment of sewers. Apart from the fact that the Arbitrator has already addressed this in his Award (para 9.14), this clause is irrelevant to the issue at hand. The respondent's claim is for the actual work involved in laying down the pipes. The final alignment of the sewers is an issue that only arises after the pipes are laid down and is therefore irrelevant to this matter.

[38] Talking about the Claims No. 11 and 15 — Financial Charges, I am of the opinion that the learned Arbitrator did not err in law and/or acted without jurisdiction in coming to the conclusion that the respondent was entitled to finance charges for the delay suffered by the respondent in valuation and in payment by the applicant.

[39] The contention by the applicant that the respondent only pleaded for delay in payment and not for delay in valuation and therefore the Arbitrator erred when he awarded finance charges for delay in valuation as well is wrong. The respondent's points of claim clearly pleaded delay in valuation (exh NCA-3 encl 3, Claim No. 11 at pp 273 and 274 under the heading of 'Interim Certificates' and 'Progress Payments' respectively). Apart from the fact that it is the exact same submission made by the applicant during the arbitration hearing, and apart from the fact that it has been exhaustively argued and dealt with properly by the Arbitrator, the contention by the applicant is that there is no provision in the contract is clearly untenable (para 11.6–11.18 of the Award). This issue was addressed by the parties during submissions at the arbitration and the learned Arbitrator clearly had regard for the same in reasoning his findings. The learned Arbitrator found, after considering submissions of both parties that the respondent was entitled to the costs of being kept out of funds to which it was properly entitled (paras 11.1–11.20, in particular paras 11.11 and 11.17 of the Award). The English Court of Appeal in *Rees & Kirby Ltd v Swansea City Council* (1985) 30 BLR 1 in applying the principles established in *FG Minter Ltd v Welsh Health Technical Services Organization* (1980) 13 BLR 1 at p 4 held that the contractors in that case were entitled to financing charges and Robert Goff LJ stated as follows at p 4:

> ... it seems to me, we must adopt a realistic approach. We must bear in mind, moreover, that what we are here considering is a debt due under a contract … . The [contractors] … operated over the relevant period on the basis of a substantial overdraft at their bank ... it is notorious that banks do themselves, when calculating interest on overdrafts, operate on the basis on periodic rests: on the basis of the

principle stated by the Court of Appeal in *Minter*'s case, which we here have to apply, I for my part can see no reason why that fact should not be taken into account when calculating the [Contractors'] claim ...

[40] In *Department of Environment for Northern Ireland v Farrans (Construction) Ltd* (1981) 19 BLR 1, the Northern Irish High Court held that the arbitrator had power to award damages which, could include interest incurred or lost by the contractor as a foreseeable consequences of the employer's failure to pay on the due dates. The learned Arbitrator in this case was acting well within his jurisdiction and had clearly not erred in law. Further, it should be emphasized that the Arbitrator had stressed that the respondent's calculation of damages of being kept out of the sums due must strictly follow the conditions precedent in cl 47(a) of the conditions of contract and that this will be dealt with at the quantum stage (para 11.19 of the Award). This is in accordance to the principles set out in *Rees & Kirby v Swansea City Council* and the Arbitrator cannot be said to have erred in law in this respect. On the issue of waiver or conduct estoppel, once again this concerns the issue of interest and this contention could have been raised by the applicant during submissions on liability but was not. In any event, evidence of prior notice as to the respondent's claim for financial charges was referred to in the respondent's points of claim (exh MPS-3 encl 2, p 274, last paragraph). (Note: exh 'NCA-5 encl 3' are copies of the said letters which relate to the respondent's notice of claim for financial charges which are incidentally extracted from Agreed Bundle B of the arbitration). This fact that there was notice of the respondent's intention to claim for financial charges was also adduced by the respondent's witness Mr Peter Ng at the arbitration hearing (exh NCA-6 encl 3). Therefore, the applicant's contention that the respondent accepted delayed payment without protest is clearly wrong and misleading. This application is the avenue for the applicant to advance new arguments to support its case when it could have been raised during the submissions on liability before the learned Arbitrator.

[41] On Claim No. 12 — Crossing of Sg Anak Garam, I observe that a reading of the applicant's submissions, particularly from paras 4.7.2–4.7.8 will show that what the applicant is essentially doing is re-submitting before this court on the meaning of cl 5(b) of the conditions of contract and expect the court to decide in its favour. Essentially, this is an appeal exercise on the part of the applicant. In any event, the applicant's submissions placed a great deal of irrelevant importance on the issue of the price fluctuation of materials. Essentially, this claim is for loss and expense that was incurred by the respondent for complying with the SO's instruction to replace a level reinforced concrete pipe crossing Sg Anak Garam with an inverted siphon using steel pipe. This was in accordance to cl 5(d) of the conditions of contract. This claim is not premised on the price fluctuation of materials. The learned Arbitrator's finding in this respect was properly reasoned and he clearly stated that the provisions referred to by the applicant only applied to those materials that could have been contemplated at the time of entering into the contract (para 12.13 of the Award). The change of design from a level crossing of Sg Anak Garam using reinforced concrete pipes to an inverted siphon using steel pipes (as opposed to a fluctuation of price for a material), which was the subject matter of this issue, was not contemplated at the time of entering into the

contract. Also, the Arbitrator made a proper cogent decision on the scope of the term 'similar conditions' (paras 12.9-12.12 of the Award). This is an issue that had been exhaustively argued before the Arbitrator. The Arbitrator's decision cannot be set aside merely because the applicant is of the opinion that it is erroneous. As to the applicant's contention in applying the expressio unius rule of construction to the contract, this has already been addressed to by parties during the submissions on liability.

[42] On Claim No. 13 — Final Certificates, I observe that the learned Arbitrator did not err in law in coming to the conclusion that the respondent was entitled to prove liability and quantum for one of the three heads of claim in the claim for a Final Certificate in Package 106. The issue of site clearance is a matter of mixed liability and quantum that could not be separated as contended by the applicant. In this situation, the learned Arbitrator has held over a matter of liability to the quantum stage by allowing the respondent to demonstrate that site clearance was ordered by the SO. The learned Arbitrator cannot therefore be regarded as functus officio as he has yet to make a final decision on liability for this matter.

[43] In any event, the applicant's contention that the Arbitrator failed to appreciate that the nature of the respondent's claim was time-related and therefore the applicant must be allowed to challenge EOT Certificate No 1 is clearly wrong. The Arbitrator clearly appreciated the issue. The applicant argued that it was entitled to raise whatever defences that were available to it. The Arbitrator made a decision that whilst the applicant was not prevented from raising issues and adducing evidence to rebut the claim for loss and expense, the applicant could not rebut it by trying to challenge the EOT Certificate that it did not challenge before (paras 6–7 decision on Three Issues, Appendix 1 of the Award). The respondent's claim for loss and expense was based on the EOT Certificate. As the Arbitrator rightly decided, reviewing and revising a certificate cannot be a defence to a claim for loss and expense that arose out of an unchallenged certified extension of time. In any event, the Arbitrator also found, without implying any moral turpitude by the SO that the SO had mistakenly thought the granting of EOT as the prerogative of the applicant (para 7.55–7.60 of the Award). On the facts, the Arbitrator found that the SO did not act as an independent certifier as asserted by the applicant. The Arbitrator found, on the evidence, that after the SO assessed a claim, he would submit his findings to the applicant for a decision. It follows that the applicant cannot now challenge its own decision by attempting to open up the EOT. However, it is also necessary to note that the Arbitrator made it clear that nothing turns on this conclusion he made (para 7.60 of the Award). This clearly shows that the Arbitrator had all the relevant issues in mind when coming to his decision. Also, the applicant's submission that the respondent is in fact seeking for the Arbitrator to open up and revise EOT No 1 by asking for a further extension of time is untenable. EOT No 1 was already granted by the applicant based on certain reasons. During this extended time, there were other reasons of delay which entitled the respondent to a further extension of time. These delays should be assessed on their own merit and should not be linked to EOT No 1. In any event, this issue had already been addressed to by the Arbitrator (para 8 decision on Three Issues).

The Arbitrator did not acknowledge that the amount of extension of time was in issue. He found that there were further events causing delay after the first extension of time, which were not considered in the assessment for the second EOT (paras 7.54, 7.61 and 7.62 of the Award). There are no inconsistencies in the Award. It is neither uncertain nor ambiguous.

[44] The applicant raised the right to review and revise the EOT Certificate No. l as a defence to the respondent's claim for loss and expense resulting from this EOT Certificate No 1. The applicant had a right to challenge the EOT previously but did not do so. Therefore the Arbitrator held that the applicant cannot now do so as a defence to a claim that is based on the very thing that it failed to challenge previously. As stated the Arbitrator held that the applicant was not prevented from raising whatever other defences it may have to the loss and expense claim. The applicant's contention that the Arbitrator had misconducted himself by not considering whether EOT No 1 was properly given is clearly untenable. This was never in issue. What was in issue was the respondent's loss and expense claim as a result of EOT No 1 and not whether EOT No 1 itself was correct. There is no misconduct on the part of the Arbitrator. The Arbitrator has not failed to appreciate any of his duties and powers as provided for under the Contract.

[45] In conclusion, it would appear that the applicant is attempting to change this court's supervisory function into that of an appellate one. The conclusions reached by the learned Arbitrator were mixed conclusions of fact and law which could not be properly reviewed in an application such as this. There are no fundamental errors of law in the Award. The Award is cogent and certain. All the decisions made by the Arbitrator in the Award were properly reasoned. There are no inconsistencies in the Award. Nor is the Award ambiguous. Gopal Sri Ram JCA in *Hartela Contractors Ltd v Hartecon JV Sdn Bhd* [1999] 2 MLJ 481 stated as follows at p 487:

> The general rule at common law is that, absent a contrary intention in the agreement to arbitrate entered into between the parties to a controversy, the award of an arbitrator is final, binding and conclusive. It may not be challenged merely on the ground that it is erroneous.

[46] Raja Azlan shah J (as DYMM then was) in *Sharikat Pemborong Pertanian v Federal Land Development Authority* reminds us that 'this is not a re-hearing'. In the circumstances, the applicant's application is hereby dismissed with costs.

Application dismissed.

Reported by Sally Kee Seok Meng